



administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted” or is “frivolous or malicious.” § 1915(e)(2)(B)(i), (ii). A finding of frivolity can be made where the complaint “lacks an arguable basis either in law or in fact.” *Denton v. Hernandez*, 504 U.S. at 31. Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Allison v. Kyle*, 66 F.3d 71 (5<sup>th</sup> Cir. 1995).

This court is required to liberally construe *pro se* documents, *Estelle v. Gamble*, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe*, 449 U.S. 9 (1980) (*per curiam*). Even under this less stringent standard, however, the *pro se* complaint is subject to summary dismissal. The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10<sup>th</sup> Cir. 1999), or construct the plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411, 417-18 (7<sup>th</sup> Cir. 1993), or “conjure up questions never squarely presented” to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4<sup>th</sup> Cir. 1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, (4<sup>th</sup> Cir. 1990).

### Background and Discussion

Plaintiff alleges that he was prosecuted for the May, 2010 robbery of Defendant Sonny's Restaurant, as a result of defamation committed by that Defendant. Plaintiff also alleges that he was falsely arrested by Defendant Cherokee County Solicitor's Office. Plaintiff reports that he was acquitted of the robbery charges at trial.

The complaint filed in this case is subject to summary dismissal under the provisions of 28 U.S.C. § 1915(e)(2)(B)(ii)<sup>2</sup>, as Plaintiff has failed to state a claim for relief under § 1983. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271(1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). A civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

As a preliminary issue, Defendant Sonny's Restaurant is not a "person acting under the color of state law." Plaintiff makes no allegation that this restaurant is any kind of state actor that would be amenable to suit under § 1983. Even if Sonny's Restaurant were amenable to suit, a defamation cause of action would not lie under § 1983. Section 1983 "cannot be used as a vehicle for asserting a claim of defamation." *Wildauer v. Frederick*

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<sup>2</sup> 28 U.S.C. § 1915(e)(2)(B)(ii) says the court must dismiss a case if it determines the complaint "fails to state a claim on which relief may be granted."

*County*, 993 F.2d 369, 373 (4<sup>th</sup> Cir. 1993). Any defamation suffered by Plaintiff would not be actionable under § 1983 because it does not implicate federal constitutional or statutory rights; “[d]efamation, by itself, is a tort actionable under the laws of most states, but not a constitutional deprivation.” *Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

Defendant Cherokee County Solicitor’s Office is not amenable to suit, either. Since that office is established pursuant to Article V of the Constitution of the State of South Carolina, the Defendant Cherokee County Solicitor’s Office is immune from suit under the Eleventh Amendment, which divests this court of jurisdiction to entertain a suit brought against the state of South Carolina or its integral parts, such as a state agency or department. See, e.g., *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)(although express language of Eleventh Amendment only forbids suits by citizens of other states against a state, Eleventh Amendment bars suits against a state filed by its own citizens); *Belcher v. South Carolina Board of Corrections*, 460 F.Supp. 805, 808-809 (D.S.C.1978); and *Simmons v. South Carolina State Highway Dept.*, 195 F.Supp. 516, 517 (E.D.S.C.1961). Under *Pennhurst*, a state must expressly consent to suit in a federal district court. *Pennhurst*, 465 U.S. at 98. The state of South Carolina has not consented to suit in a federal court. See S.C. Code Ann. § 15-78-20(e)(1976)(statute expressly provides that the state of South Carolina does not waive Eleventh Amendment immunity, consents to suit only in a court of the state of South Carolina, and does not consent to suit

in a federal court or in a court of another state). Thus, because Plaintiff seeks money damages from Defendant Cherokee County Solicitor's Office, the case against this Defendant should be dismissed. Thus, as Plaintiff has named no Defendant who is amenable to suit under § 1983, this case should be summarily dismissed.

Recommendation

Accordingly, it is recommended that the District Court dismiss the complaint in the above-captioned case *without prejudice* and without issuance and service of process. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *see also Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972). Plaintiff's attention is directed to the important notice on the next page.

s/Jacquelyn D. Austin  
Jacquelyn D. Austin  
U.S. Magistrate Judge

November 1, 2011  
Columbia, South Carolina

### **Notice of Right to File Objections to Report and Recommendation**

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4<sup>th</sup> Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk  
United States District Court  
300 East Washington Street, Room 239  
Greenville, South Carolina 29601

**Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.** 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).